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NO. 81-1151

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/Petitioner,

v.

LOWER ELWHA TRIBE,
Plaintiff-Intervenor/Respondent,

v.

STATE OF WASHINGTON, et al.,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Makah Indian Tribe and the Lower Elwha Tribe made separate treaties with the United States in 1855 which guaranteed to the tribes the right to fish at usual and accustomed fishing grounds in common with other citizens. The district court ruled that five rivers lying between their reservations are usual and accustomed fishing grounds of both tribes. This dispute concerns the respective fishing rights of the tribes in those rivers. The Makah Reservation lies on the northwest tip of the Olympic Peninsula. The Lower Elwha Reservation is some fifty miles to the east. The five disputed rivers drain into the Strait of Juan de Fuca. These rivers, beginning with the most westerly, are the Hoko, Pysht, Twin, Lyre and Elwha Rivers. The court ruled that the Hoko River is subject to joint use and control by the Makah and Lower Elwha Tribes, and

that on the four rivers lying east of the Hoko River, Makah fishing can be precluded totally by the Lower Elwha Tribe.

1. May the treaty rights of a tribe be subjected to an absolute power of extinguishment in a competing tribe?

2. In determining the respective fishing rights of tribes which share traditional fishing grounds, may the court disregard evidence of post-treaty fishing activities?

3. Is due process satisfied if pre-treaty occupation of territory is allowed to raise an irrebutable presumption of pre-treaty control over fishery resources?*

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* A list of all parties to the proceeding can be found in Appedix D.

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

The petitioner Makah Indian Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 20,

1981. This action arose as a part of the massive litigation brought by the United States against the State of Washington and other defendants to determine the fishing rights of certain tribes in the Pacific Northwest. The petitioner Makah Indian Tribe intervened at the outset of the litigation, and the respondent Lower Elwha Tribe intervened after the district court's basic decision was rendered several years later. The district court retained jurisdiction to determine the many complex issues presented and to ensure enforcement of its orders. This particular portion of that litigation is a dispute between the two tribes over fishing rights in five rivers on the north shore of the Olympic Peninsula in Washington State.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 642 F.2d 1141

(1981). The opinion of the District Court for the Western District of Washington is reported at 459 F. Supp. 1020 at 1048, 1066 (1976). Both opinions are set out in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on April 20, 1981; see Appendix at B-1. On June 17, 1981, Associate Justice William H. Rehnquist of the United States Supreme Court entered an order extending the time for filing this petition to July 15, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation." The Treaty with the Makah, 12 Stat. 939 (January 22, 1855, ratified March 8, 1959). The Treaty with the Makah is set out in the Appendix at C-1.

The Treaty of Point No Point, 12 Stat. 1933 (January 26, 1855, ratified March 8, 1859). The Treaty of Point No Point is set out in the Appendix at C-12.

STATEMENT OF THE CASE

The District Court for the Western District of Washington, on February 12, 1974, issued the underlying decision in this case. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (hereinafter referred to as "Final Decision No. 1").[1] Final Decision No. 1 was affirmed

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[1] The jurisdiction of the district court is based on 28 U.S.C. § 1345, in that the United States brought the action on its own behalf and on behalf of federally recognized Indian tribes in connection with its administration of Indian affairs; 28 U.S.C. § 1331, in that the matter in controversy

by the Court of Appeals for the Ninth Circuit, and certiorari denied. 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Later proceedings were appealed, and this Court, while effecting minor changes in Final Decision No. 1, basically affirmed the decisions made by the court of appeals and by the district court. State of Washington v.

(footnote 1 continued)

involved the fishing rights of each of the intervening plaintiff tribes which were claimed to exist and to be secured under the Constitution, laws and treaties of the United States, such rights exceeding in value the jurisdictional amount; 28 U.S.C. § 1343(3) and (4), in that the plaintiff-intervenor tribes alleged that the State of Washington and its agencies had, under color of state law, deprived them of rights secured to them in their treaties and under the Constitution of the United States; and unde 28 U.S.C. § 1362, as to those plaintiff-intervenor tribes which had a governing body duly recognized by the Secretary of the Interior and which alleged violations of rights under the Constitution, laws and treaties of the United States.

Washington Commercial Passenger Fishing Vessel Ass'n and Washington Kelpers' Ass'n, 443 U.S. 658 (1979) (hereinafter "Washington v. Fishing Vessel Ass'n"). The Court there held that Indian treaties securing the "right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory" guaranteed tribes the right to harvest a share of each run of anadromous fish passing through tribal fishing grounds.

The historic and continuing importance of fishing to the Makah Tribe forced it to become one of the lead participants in the litigation. The Makahs have occupied the northwest tip of the Olympic Peninsula for at least 2500 years. As shown below, the Makahs always were and still are a fishing people, heavily dependent upon fishing for their livelihood.

At and before the time of the treaty, the Makahs' aboriginal territory extended from the Hoko River west along the Strait of Juan de Fuca to Cape Flattery, and south from that point to Lake Ozette. The Makahs differed from other Indians in Washington State in their culture and their language, which was of the Nootka language family. Other Nootkan speakers lived on Vancouver Island on the northern side of the Strait of Juan de Fuca in what is now Canada.

> Aboriginally and at the time of the treaty the Makah had close cultural ties with their Nootkan-speaking relatives on Vancouver Island. Their closest ties in terms of intermarriage, trade, and ceremonial relationships were with Nootkans across the Strait, rather than with their Salishan and Chimakum-speaking neighbors in Washington.

B. Lane, Report on the Makahs, Ex. U.S. 21, at 4.[2] Intermarriage between members of

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[2] Exhibit numbers are those used throughout this case. References to testimony will be by Transcript (Tr.) date. References to Final Decision No. 1 will be to Findings of Fact (FF) or Conclusions of Law (CL).

the Makah and Clallam Tribes was more limited before treaty time than after, and was never extensive. B. Lane, Report on Lower Elwhas, Ex. U.S. 91, at 44. Not only were the Makahs and Clallam not particularly close, but there is evidence of long-standing hostility between these tribes, which existed before and to some extent after treaty times. Ex. U.S. 21, at 20-21; Ex. U.S. 91, at 44; Ex. Mk 2, at 2.

At and before the time of the treaties, the Makahs maintained separate winter and summer villages, from which their fishing industry was based. During and after treaty times, the Makahs moved in the fall from their summer camps to camps providing access to accustomed places for taking fish from the streams and rivers draining into the Strait of Juan de Fuca (Final Decision No. 1, FF 63).

The district court summarized the Makah fishing industry as compared to neighboring tribes as follows:

> 66. In aboriginal times the Makah enjoyed a high standard of living as a result of their marine resources and extensive marine trade. With the advent of non-Indians to the area, new markets developed, Makah marine pursuits were intensified and Makah wealth increased. [Ex. USA-21, page 29] The Makah not only sustained a Northwest Coast culture, but also were wealthy and powerful as contrasted with most of their neighbors. They maintained from time immemorial a thriving economy based on commerce. [Ex. USA-21, pages 32-33].

Final Decision No. 1, FF 66.

There can be no dispute that the Makah fisheries at treaty times were far more developed than those of its neighbors. The district court found that the usual and accustomed places of the Makah Tribe included the streams and rivers from the Elwha River west to the Pacific shore. Final Decision No. 1, FF 65. No finding was made, nor evidence presented in the

underlying case, that the Makahs fished these rivers or set up their fall camps in any way other than freely and by virtue of right.

The territory to the east of the Hoko River extending to the northeast portion of the Olympic Peninsula was occupied by the Clallam. The Lower Elwha Band are descendants of the Clallam people who inhabited this area in 1855. They belonged to the language group known as Coast Salish, and fished in the rivers along the Strait of Juan de Fuca and in the adjacent marine waters commencing with the Hoko River in the west to the northeast end of the Olympic Peninsula.

The Hoko River has always been claimed by the Makahs as one of their fishing stations. Tr. August 6, 1975, p. 155. However, it was apparently the site of joint occupancy by the Makahs and Clallams. It is not clear whether the Clallams had a

permanent village there, or merely a temporary village. Waterman, writing of the Clallams, says that the Clallam village at the Hoko was only a fishing station. It has been established that there was a Makah seasonal village at the Hoko in both pre-treaty and post-treaty times. Ex. USA-91, at 4-7, 22. Archaeological evidence indicates that the Hoko River was used as a Makah fishing camp over a very long period of time. Artifacts at the Hoko River dating some 2500 years old have been excavated. These artifacts, along with those discovered at the Ozette River on the Pacific coast, share characteristics which establish them as being of Makah-Nootka style. In this way they differ very markedly from artifacts produced and used by Salishan peoples, such as the Clallam. Tr. November 29, 1976, at 23-66, 96-99.

From that point on, to the present day, the Hoko River has been an important

fishing station of the Makahs. At treaty times, the Hoko and Lyre Rivers were utilized by the Makahs as the primary source of dog or chum salmon. Chum salmon was utilized by the Makah for winter food and for trade because it could be dried and preserved without becoming bitter. The Hoko, of course, was the closer river to the Makahs, and was considerably closer to Makah centers of population than to the major Clallam centers.

The long occupancy of the Hoko River by the Makah people; the powerful status of the Makah in contrast to their neighbors; the uncontroverted evidence of an established Makah fishery, and the very high concentration of Makah population relatively close to the Hoko demonstrate that fishing on the Hoko was subject to the influence or control of the Makahs. Tr. November 29, 1976, pp. 100-101, 105; Ex. USA-21, at 32.

It is unquestioned that the Makah were a powerful and wealthy tribe as compared to their Indian neighbors. Final Decision No. 1, FF 66. There is substantial evidence of longstanding hostility between the Makahs and Clallams which existed before and to some extent after treaty times. Ex. USA-21, at 20-21; Ex. Mk 2, at 2; Ex. USA-91, at 44. There is evidence that on one occasion when the Elwhas attempted to prevent the Makahs from fishing in Crescent Bay, west of the Hoko, the action was viewed by the Makahs as insolent and resulted in a party of Makahs killing and beheading 12 Clallam men and taking their women prisoners. J. Swan, Almost Out of the World: Scenes From the Washington Territory, The Straits of Juan de Fuca, 1859-1861.

The Makahs and Clallams fished the same rivers and streams draining into the Strait of Juan de Fuca from the Hoko River

east to the Elwha River in both pre-treaty and treaty times. There is little if any specific evidence that the Makahs ever sought or received permission from the Clallams to fish any of the rivers on the Straits of Juan de Fuca. Because of the limited extent of intermarriage around treaty times between the Makahs and the Clallams, the long history of Makah fishing in rivers all along the Strait of Juan de Fuca, the Makah dependence upon such rivers for food, their high mobility and extent of maritime commerce, together with the longstanding hostility between the Makahs and Clallams, and the absence of any evidence of Makah recognition of primary or prior Clallam ownership rights of these rivers, it is highly improbable that the Makah fisheries on such rivers were based on consanguinity or permission. It would therefore seem that both the Clallam and

the Makah fished in the rivers east of the Hoko under claim of right to do so.

It is undisputed that the rivers and streams from the Hoko east to the Elwha are usual and accustomed fishing places of the Makah Tribe. Final Decision No. 1, FF 65. When that finding was initially made, it was based in large part upon the testimony and reports of Dr. Barbara Lane and testimony of Makah elders. In order for a specific area to be designated a usual and accustomed place, it must be an area where members of the tribe "customarily" fished, not an area used "infrequently or at long intervals and extraordinary occasions". 384 F. Supp. 312, 332 (1974). Makah fishermen customarily fished in the rivers west of the Elwha River.

The Makahs and the Lower Elwhas made separate treaties with the United States in 1855. The treaties were almost identical in important respects, as were all of the

treaties with tribes in western Washington. The treaties guaranteed that the tribes would always be able to fish at their traditional fishing grounds:

> The right of taking fish . . . at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States . . .

Article 4, Treaty With The Makah, 1855, 12 Stat. 939 (ratified March 8, 1859). The district court found no indication that the Indians intended or understood that the treaties would limit their right to fish in any way. Final Decision No. 1, 384 F. Supp. 312 at 333. Moreover, these treaties speak to future conflicts between the tribes:

> Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby.

Id., Article 9.

In post-treaty times, many Elwhas moved to the new communities in Port Gamble and Port Ludlow to work in the newly created sawmills and appear generally to have drifted away from fishing towards agricultural, industrial and other pursuits associated with the non-Indian economy. Ex. US 31, at 136-137; Ex. US 91, at 21, 43. Few Elwhas continued to fish with the persistence of the Makahs. As early as 1859, the Elwha fishing villages began to disappear and their fishing activity dwindled. There is little evidence of post-treaty Elwha fishing in the Hoko, Lyre, Pysht and Twin Rivers after the early twentieth century. Ex. US 31, at 136-137; Tr. August 6, 1975, at 139-148.

The Makahs, on the other hand, have remained a fishing people, heavily dependent on fishing for their livelihood, Ex. G-29f (Colson) at 28, 34, 44, 283-284, and the Makah Tribe has regulated its fishermen

since 1937. Final Decision No. 1, 384 F. Supp. 312 at 365. The district court found that nearly one out of every five Makahs was engaged in fishing at the time the underlying decision was rendered in 1974. Final Decision No. 1, FF 67. The Makahs have continued to fish the rivers along the Straits as they did before treaty times. They built and maintained smokehouses on the Hoko, Lyre and Pysht Rivers during the twentieth century. While they conduct a substantial marine fishery, many Makahs have continued to participate and depend upon river fisheries from the Makah Reservation east to the Lyre. Ex. Mk 3, pp. 9-13, 15-16, 30; Tr. July 30, 1975, pp. 137-146.

Indeed, during the 120 years following the treaties, long after many of the Elwhas had moved to the towns, the Makahs continued to earn their livelihood from these rivers and risked their freedom and their

property to do so. Their only adversaries were the non-Indians and their government--the County game wardens and State Fisheries patrol. They braved threats, harassment, arrests and seizures. Their greatest reliance was on the Hoko River, and when the State of Washington sought to prevent their fishing there in 1933, they aggressively defended the Hoko and pursued the issue in the courts until they were finally successful in 1951 after 18 years of litigation. Makah Indian Tribe v. McCauley, 39 F. Supp. 75 (W.D. Wash. 1941); McCauley v. Makah Indian Tribe, 128 F.2d 867 (9th Cir. 1942); Makah Indian Tribe v. Moore, 93 F. Supp. 105 (W.D. Wash. 1950); Makah Indian Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951).

In short, Indian fishing in the rivers and streams flowing into the Strait of Juan de Fuca from the Elwha River west to the Hoko over the past century was dominated by

Makahs as it had been from ancient times, until the court's order in 1976.

The Makah Tribe intervened in United States v. Washington immediately after the United States filed the complaint in 1970, and was a lead participant in the lengthy proceedings leading to the Indian victory in Final Decision No. 1 in 1974. The Lower Elwha Tribe did not intervene until after Final Decision No. 1 had been rendered. As noted above, the district court found that the Elwhas traditionally fished at five rivers which the court had previously found to be usual and accustomed fishing areas of the Makahs. Order Re: Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes, 459 F. Supp. 1048 (W.D. Wash., April 18, 1975). This dispute developed when the tribes filed conflicting regulations for these rivers. The district court ruled the Hoko River was subject to joint use and control

by the Makah and Lower Elwha tribes, and that on the four rivers lying east of the Hoko River, Makah fishing was subject to the control and possible total preclusion by the Lower Elwha Tribe. Order Re: Makah Request For Reconsideration of Lower Elwha Usual and Accustomed Fishing Places, 459 F. Supp. 1066 (W.D. Wash., March 10, 1976). After further proceedings, the Court of Appeals for the Ninth Circuit affirmed. 642 F.2d 1141 (1981). See Appendix at B-1.

The court of appeals characterized the district court's ruling as a finding of fact, which must be upheld unless clearly erroneous. 642 F.2d 1141 at 1142. A closer examination, however, reveals that this ruling turned on a critical point of law. The district court elevated a general anthropological principle to a rule of law, an irrebuttable presumption that occupancy of territory entails total control of

fishery resources. Stated differently, the court held that pre-treaty territorial occupancy raises a conclusive presumption of a primary right in the occupier to all fish in the rivers and streams of the territory. The secondary right held by the non-occupier is to fish only at the sufferance of the primary right holder. As will be seen, there was no other basis for the court's conclusion that the Elwhas had, at treaty times, a right to preclude totally Makah fishing east of the Hoko, for it is undisputed that the Makahs did fish in that area and there was no evidence that the Makahs ever requested or received permission from the Elwhas prior to fishing. As developed in this petition, application of this anthropological principle as a rule of law was erroneous because (1) this principle applies in the consideration of the relative rights of individuals, and not the relative rights of entire peoples; (2)

there was no testimony that it was an unvarying principle which would always apply; and (3) the legal presumption that occupancy of territory entails control of fishery resources is contrary to the actual pre-treaty relationship between the Makahs and the Lower Elwhas'. Moreover, the district court disregarded evidence of post-treaty Makah dominance over these fisheries and the substantial Elwha abandonment of them. In the court's view, rights are fixed at the time of the treaty, making post-treaty evidence irrelevant.

Again, the finding of pre-treaty Elwha control over the rivers east of the Hoko was not based on direct evidence, for there was none, nor was there evidence that the Makahs obtained Elwha permission prior to fishing. Rather, it was based upon the irrebuttable presumption formulated by the court. This irrebuttable presumption was suggested by the testimony of Dr. Barbara

Lane that as a general principle, rivers lying within the "territory" of a tribe were subject to its primary use and control, and that any other tribes could use those rivers only by permission. In the absence of direct evidence of control or permission, the finding of pre-treaty Elwha control east of the Hoko turns entirely on the correctness of the court's application of the irrebuttable presumption that occupancy of territory entails control of fisheries.

The rivers and streams east of the Hoko were included, Dr. Lane testified, in Clallam "territory". Dr. Lane testified that by "territory" she meant those areas "generally recognized as being primarily occupied and used by or owned by, if you prefer that term, the resident group". Tr. August 6, 1976 at 152-153. The court's conclusion, simply stated, was that the location of the rivers within Clallam

territory meant exclusive Clallam ownership, and therefore any other tribe fishing there did so by virtue of a "use" right subject to permission by the Elwhas. 459 F. Supp. 1066, 1067 (Order of March 10, 1976).

This "general principle" was based on the "generally accepted view of people concerned with the ethnography of this area", Tr. August 6, 1975, at 171 (Testimony of Dr. Lane). No other evidence supporting Lower Elwha domination or control of these rivers was presented.

Sole reliance on the principle that "territory entails control of fishing" was erroneous as a matter of law. The testimony draws into question the usefulness of any general principal when discussing inter-tribal rights, for such rights were, at treaty times, exceedingly complex.

In discussing Indian fishing "rights" among themselves, Dr. Lane states that

these "rights" varied from individual ownership to "shared access to specific trolling areas". Ex.; USA 20, at 19. She says specifically that:

> . . . Individual Indians had primary use rights to locations in the territory where they resided and secondary use rights in the natal territory (if this was different) or in territory where they had consanguineal kin. Subject to such individual claims most groups claimed exclusive fall fishing rights in the waters near their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

Ex. USA 20, p. 20 (emphasis added). The doctrine of primary rights, then, was related to individual claims. Dr. Lane stops far short of suggesting that as to tribal rights, territory alone was determinative, without regard to other circumstances. In fact, on several occasions, Dr. Lane has testified that territory was not a determinative circumstance, and on one occasion, that ownership/use

rights could not be equated with primary rights, and that it was erroneous to assume that any river system was used or owned by one tribal group. Dr. Lane continuously fought against the notion of a one-to-one tribal river system analysis.

> Q. Item No. 4, "Access to village territory was available to outsiders. There was a feeling, however, on the part of both host and visitor that such territory belonged to the home group."
>
> A. [Lane] I can agree with that. It depends quite a bit on who the outsiders were.
>
> I should qualify in my answer, some of the people who were not residents of the village might be outsiders in the sense that they were not residents in the village, but they might have as much primary rights to that territory as people who were residents in it at a given time.

Tr. September 5, 1973, at 1777. (Emphasis supplied). On several occasions, Dr. Lane has stated that the one river-one tribe notion is inappropriate. Tr. September 6,

1973, at 1921, 1986. Specifically, Dr. Lane states that "the frequency with which a given resource area might be used was, to the best of my knowledge, irrelevant to who held title to that." Tr. September 6, 1973, at 1954-1955. Finally, Dr. Lane reported multiple "ownership" of fishing places.

> Q. Dr. Lane, as I understand your testimony, the Indians at treaty times did have property concepts in that particular Indians might have an ownership interest in a fishing site and they would grant user interest to other Indians, is that correct?
>
> A. That's correct.
>
> Q. When you spoke of a primary and secondary right, would the ownership interest be the primary right you refer to and the user interest the secondary right?
>
> A. No, no, that's not what I referred to.
>
> Q. Would you clarify then the difference between a primary and a secondary right for me?

A. Yes. It is simply that certain people would have stronger rights, if you would like to put it that way, in a resource producing area or any fishing location than other people who had weaker rights but still had rights, and these would, in my view, would be termed as ownership rights in the location. However, they were not of the same degree.

Q. There were varying degrees of ownership rights, is that your testimony?

A. Yes, as I am using the term.

Tr. September 7, 1973, at 2024.

It is thus clear that there were many types of ownership or use rights held by tribes and individuals at their usual and accustomed places, and many different kinds of relationships between individuals and tribes at shared places. Dr. Lane's own testimony shows use of the general principle of "territorial occupancy entails total control of fisheries" as an irrebuttable rule of law would be erroneous. The "principle" is useful only if there is

evidence showing its application. Here, the evidence positively shows that the principle does not apply.

The evidence is overwhelming that Makah fishing east of the Hoko was by virtue of right, and not permission. First, there is evidence relating generally to the relative position of the Makah and Clallam tribes in the areas: the Makahs' overwhelming maritime economy, its undisputed power, the general hostility between the two tribes, the minimal amount of intermarriage between the tribes, and to the extent relevant, the geographical location of tribal people at treaty times. Second, there is evidence relating specifically to Makah ownership and use of river fisheries east of the Hoko. Third, and perhaps most critically, there is a complete lack of any specific evidence showing Makah requests for, or Clallam granting of, permissive use of the fisheries. Taken

together, these factors make it inconceivable that the Makahs requested, or that the Elwhas would have granted, permission to fish in what were admittedly their usual and accustomed places, places where they regularly fished.

Dr. Lane has recognized the importance of the Makah fall salmon fishery. Although summer salmon in the Straits was more productive, ". . . the taking of fall run salmon in the rivers was clearly of vital importance to the Makah . . ." Ex. US 21, at 22. The fall river fishery was particularly important because it provided kinds of fish not available in the ocean, fish which could be smoked for winter use.

> Dog salmon, or chum, were available in the Lyre and Hoko Rivers. They were in demand because they are lean and have better keeping qualities and are more easily dried than salmon with more fat such as the coho which could be trolled for in the Strait throughout the year. Coho were eaten fresh; whereas chum were smoked for winter stores.

Ex. US 21, at 20 (Emphasis supplied). Dr. Lane's own analysis of Makah fishing on the Lyre and other rivers is particularly illustrative.

> The Lyre River is farther west than Clochudit and, according to T. T. Waterman, it also lies within Clallam territory. Waterman (Bureau of American Ethnology Manuscript # 1864) noted that the Makah owned some sort of fishing rights in that river.
>
> . . . .
>
> The distances between the Lake Ozette fishery, the halibut banks lying northwest of Tatoosh Island, and the Lyre River fishery illustrate why it was necessary for the Makah to range widely over their territory to utilize its varied resources. The fact that some of these resources, fall salmon runs, for example, became available at about the same time in different locales, made it profitable for groups of Makah to disperse in various directions, harvest the fish in their domain, and then to trade their surplus supplies.

Ex. US 21 at 21 (Emphasis supplied). Here, Dr. Lane recognized that Makah fishing at

the Lyre was due to some type of "ownership" right, and that at least for fisheries purposes, the Makah "territory" ranged at least that far east.

As noted, the court did not rely on direct evidence of Makah requests for, or Lower Elwha granting of, permission to fish in these rivers, because there was none. Rather, the only basis for the court's decision was the "general principle" that "occupancy of territory means total control of fisheries". This general principle was used, in effect, as an irrebuttable presumption or a rule of law which could not be overcome by evidence that the actual relationship between the tribes prior to the treaty was contrary to the presumption.

This presumption is contrary to the actual relationship between the two tribes prior to the treaty. There is overwhelming evidence that the Makahs controlled the

Hoko, and that the Makahs and the Lower Elwhas jointly owned and used the rivers east of the Hoko by right, and that there was a general acceptance of that right. Not a shred of evidence was presented that the Makahs ever requested or were granted permission prior to fishing in the rivers east of the Hoko.

By applying the presumption that occupancy includes control over the fishery resource, the court ignored the principal element of control--the ability to fish where one wished. The Lower Elwhas admitted in their brief in the court of appeals that the Makahs had such an ability. Lower Elwha brief at 49.

Until 1976, the Makahs fished all eight of the disputed rivers. The centuries of Makah fishing on the rivers east of the Hoko, however, ended when the district court ruled that Makah fishing on those rivers is subject to the permission of the

Lower Elwha Tribe, and that the Lower Elwha Tribe might totally preclude Makah fishing in those rivers. The court did not condition the power of the Lower Elwhas to preclude the Makahs by any standard of reasonableness or necessity. Under the court's ruling, the Lower Elwhas can exercise their power to grant or deny permission to the Makahs arbitrarily. Since 1976, that permission has never been granted, and the Makahs' right to fish in these rivers which they had fished for centuries before the treaty and for 120 years after the treaty, was effectively extinguished.

The Makah Tribe argued in the court of appeals that the Elwhas should not have a power of absolute preclusion under the facts of this case. Any such power must be tempered by the application of equitable principles. The Makah Tribe also suggested that disputes between the tribes with

respect to fishing on all of the rivers should be subject to arbitration or mediation by such a body as the Northwest Indian Fisheries Commission or the Treaty Area Council, but that it was impossible to have mediation, arbitration or negotiation if there was a flat rule that the Lower Elwhas could preclude Makah fishing totally without any standard of reasonableness or necessity or other condition to their exercise of discretion. Alternatively, the Makah Tribe suggested that disputes as to all rivers should be determined by Special Master, without any rule of absolute discretion in one tribe or the other, the Special Master being guided by equitable principles based upon joint rights in the fishery.

The affirmance by the court of appeals has led to a grossly unjust result. The Makahs, who had fished these rivers, and in particular the Hoko, continuously since

ancient times, now found themselves barred from all of the eastern rivers and forced to submit to an equal sharing of the Hoko with a group which had largely been absent from the fishery since the early part of the twentieth century.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions of This Court Which Hold That An Indian Treaty Is a Reservation of Rights by the Indians, and Not a Grant of Rights to Them.

The court below disregarded post-treaty evidence of Makah domination of the fisheries. The provisions of the treaties themselves reveal the error. It was provided in Article 9 of both treaties that the tribes would not allow future conflicts between them to lead to war, and that the tribes agreed to submit their disputes to the United States. This dispute was not submitted to the United

States until 1975. Clearly, the determination of the dispute should be made on the basis of the equities between the parties as they existed at that time, rather than as of the date the treaties were signed.

In effect, the court below ruled that the rights of the tribe are fixed as of the time of the treaty. This would make sense if the treaty was a grant of rights to the tribe. This Court has repeatedly ruled, however, that an Indian treaty is a reservation of rights by the Indians, and not a grant of rights to them. United States v. Winans, 198 U.S. 371 (1905). The right to fish being reserved, the only thing ceded by the treaties was the duty to yield to the non-Indian an "in common" right to take fish at usual and accustomed fishing grounds. Everything else was reserved by the tribe and therefore not fixed or bound as of the time of the treaty. As this Court stated in Winans:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grants of rights to the Indians, but a grant of rights from them--a reservation of those not granted.

Winans, supra, at 380-381. See also Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Winters v. United States, 207 U.S. 564, 576 (1908); Antoine v. Washington, 420 U.S. 194, 205-206 (1975); Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 681 (1979).

In at least one sense, it is true that treaty rights must be regarded as being fixed as of the time of the treaty. This Court has stated that:

> The impact of illegal regulation . . . and of illegal exclusionary tactics by non-Indians . . . in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century.

Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 670, n.14 (1979) (citations omitted). It would be an enormous injustice if the non-Indians were allowed to profit by illegal exclusionary conduct; thus, the rule of this Court that treaty rights are measured as of the time of the treaty. The rule must not be applied uncritically, however. The Makahs were subject to the same non-Indian pressures as the Elwhas. As between these tribes, the right should be measured in terms of the relative equities of the parties at the time this dispute was submitted to the court.

The district court has recognized that treaty rights cannot in all instances be considered as frozen as of the time of the treaties. In particular, the district court held that the treaty tribes may utilize improvements in traditional fishing techniques and use modern fishing gear which did not exist at the time of the treaties. Final Decision No. 1, 384 F. Supp. 312, 402, CL 25. In this instance, however, the courts below have misapplied the rule of Fishing Vessel, and have worked an injustice. From time immemorial, the Makahs dominated the Hoko and fished the rivers to the east. For the first time ever, when the district court entered its order in 1976, they were forced to submit to an equal sharing of the Hoko and effectively lost their rights in the eastern rivers. It is not disputed that the Makahs always fished the eastern rivers until 1976. In the absence of review by this

Court, it is unlikely that they will ever do so again.

The Makahs continued to utilize the river fisheries after the treaties and on into the twentieth century; Lower Elwha participation in these fisheries largely dwindled, and was only revived by the court battles fought and won by other tribes whose dependence upon the fisheries had continued. As to the north shore of the Olympic Peninsula, these hard-won victories were achieved by the Makahs, achievement gained out of necessity and not through fortuitous opportunity.

2. The Decision Below Conflicts With the Decisions of This Court Which Hold That Indian Treaties Must Be Construed as Indians Would Have Understood Them.

The Court has established firmly that in determining the nature and extent of treaty rights, the focal point of inquiry must be the understanding of the Indians.

The district court properly applied this rule in Final Decision No. 1 but lost sight of the rule in the instant action.

In Final Decision No. 1, the district court held that

> There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians.

United States v. Washington, 384 F. Supp. 312, 357 (1974). This language was specifically affirmed and quoted with approval by this Court in Fishing Vessel, supra, at 668, n.12. The district court found that all of the disputed rivers were at treaty times usual and accustomed fishing grounds for the Makahs. The district court later ruled, of course, that the Lower

Elwhas have a right to totally preclude Makah fishing in the rivers east of the Hoko, a power the Lower Elwhas have since exercised without exception. It is hardly to be supposed, however, that the treaty ancestors of the Makahs would have understood that by signing the treaty, with its Article 9 provision prohibiting war and requiring the submission of disputes to the United States, their tribe would one day lose its right to fish the rivers east of the Hoko.

The fundamental rule that "treaties with Indians must be interpreted as they would have understood them" has been recognized and reiterated by this Court and state courts for nearly 150 years. Recently, the Court acknowledged the principle in Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970), citing Jones v. Meehan, 175 U.S. 1, 10-11 (1899). In

another Indian treaty case, the Court stated:

> [T]reaties are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would have understood them.

United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). Accord, Worcester v. Georgia, 31 U.S. 515 (1832); Starr v. Long Jim, 227 U.S. 613 (1913); Choctaw Nation of Indians v. United States, 318 U.S. 418, 431-32 (1943).

The applicability of this rule was emphasized by this Court in Tulee v. Washington, 315 U.S. 681, 685-86 (1942):

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal

> representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

See also, Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); United States v. Winans, 198 U.S. 371 (1905); Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). In Fishing Vessel, the Court stated that

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians were repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. [Citation omitted] It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries,

Washington v. Fishing Vessel Ass'n, supra, at 676 (1979). The conclusion is inescapable that the Indians must have understood the treaty as preventing anyone from

extinguishing their right to fish. Insofar as the court below has subjected Makah fishing rights on the rivers east of the Hoko to an unqualified power of preclusion in the Elwhas, a power which has been exercised without exception, the court below is squarely at odds with the foregoing decisions of this Court.

3. The Decision Below Conflicts With the Decisions of This Court Which Hold That These Treaties Guarantee the Right to Fish at all Usual and Accustomed Areas.

The treaty guarantees to the Makahs the right to fish at all of their usual and accustomed areas. The district court found that all of the disputed rivers east of the Hoko were usual and accustomed fishing grounds of the Makahs at treaty times. In subsequently holding that the Lower Elwha can totally preclude the Makah right to fish at the Makah usual and accustomed grounds, the courts below have effectively withdrawn that guarantee.

Again, a long line of decisions by this Court construing the Makah Treaty and other western Washington treaties with identical, or nearly identical, language interpret the words "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians . . ." as a guarantee conferring enforceable special benefits on signatory Indian tribes. See, for example, Tulee v. Washington, 315 U.S. 681 (1942); United States v. Winans, 198 U.S. 371 (1905); Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979).

The flat rule dictated by the courts below, that the Lower Elwhas can totally preclude Makah fishing, without any condition as to the exercise of the Lower Elwhas' discretion, works a violation of the Makah Treaty. The obvious consequence of this flat rule is that the Makahs' right to fish at their usual and accustomed

fishing grounds east of the Hoko has been extinguished. No tribe can have such a right consistent with the treaty guarantees of another tribe, no more than the Makah, who here assert the right to control the Hoko, should have an unqualified right to bar Lower Elwha fishing in that river.

4. The Decision Below Conflicts With the Decisions of This Court Which Hold That One Fact May Not Be Made Conclusive Evidence of Another Material Fact in Controversy and Denies the Makah Tribe Due Process of Law.

As to the rivers east of the Hoko, the critical issue of fact before the district court was the extent of pre-treaty Elwha control over the fishery resources in those rivers. It was undisputed that Makahs actually fished in those rivers in pre-treaty times, and not just "occasionally" but "customarily," for these were usual and accustomed fishing grounds of the Makahs. There was not a shred of evidence that the Makahs obtained Elwha permission prior to

fishing; there is much evidence in the record to the contrary. In view of the infrequency of intermarriage, the distinct cultures and languages, and the hostility between the tribes, it is unlikely that the Elwhas would have "customarily" granted permission, or that the Makahs would have requested it.

The undisputed fact remains that Makahs did fish the disputed rivers prior to the treaty. How did the court below find that the pre-treaty Elwhas had a right to preclude totally Makah fishing? Only one piece of evidence tended to prove Elwha control: the Elwhas were the principal occupants of the territory east of the Hoko. It would have been proper had the court simply weighed this evidence against the evidence to the contrary. However, the court elevated what it found to be a general anthropological principle, the "concept of territorial control" in the

court's words, into a rule of law which conclusively presumed the material fact in controversy. 459 F. Supp. 1066, 1067. In doing so, the decision below conflicts with rules laid down by this Court concerning the validity of conclusive presumptions, and deprives the Makah Tribe of due process.

Presumptions are commonplace in the law, and most are, of course, valid. For example, a statute may provide that certain facts shall be prima facie or presumptive evidence of other facts. The constitutional limit, mandated by the Due Process Clause, is that there must be some rational connection between the fact proved and the fact presumed. United States v. Romano, 382 U.S. 136 (1965). Moreover, a statute which merely supplies an inference of fact, in the absence of evidence contradicting the inference, is valid. On the

other hand, a rule which creates an inference that is given the effect of evidence to be weighed against opposing testimony is unreasonable and violative of due process. Morrison v. California, 291 U.S. 82 (1934); Western & A.R. Co. v. Henderson, 279 U.S. 639 (1929); Casey v. United States, 276 U.S. 413 (1928); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

The law is clear that a presumption is not itself evidence and has no weight as such. United States v. Ross, 92 U.S. 281 (1876); Lincoln v. French, 105 U.S. 614 (1882); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1911); Del Vecchio v. Bowers, 296 U.S. 280 (1935); New York L. Ins. Co. v. Gamer, 303 U.S. 161 (1938). Rather, a presumption is a rule about evidence. It is merely a procedural device for determining who must come forward with proof on a particular point, and loses all of its effect as soon

as such proof is provided. Inferences or presumptions speak in the absence of evidence, but cannot be weighed in the balance as against evidence.

> Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.

Lincoln v. French, supra, at 617. See Fed. R. Evid. 301. Thus, even if the court had restricted the application of its presumption that occupancy entails control of fisheries and then had weighed this as a piece of evidence against contrary evidence, such would have been improper as a matter of law under the law as established by this Court.

The court below went even further. A fair reading of the opinions of the district court and the court of appeals shows their view that "occupancy entails control

of the fishery resources, period". Occupancy of territory determines the matter. In this, the courts below strayed far from the rulings of this Court.

The Court has subjected conclusive presumptions to much closer scrutiny than presumptions which merely raise an inference of fact. Presumptions of law which are irrebuttable can be lawful. However, a rule which declares one fact conclusive evidence of another material fact in controversy is unconstitutional if the former is not, in and of itself, by virtue of its own force, conclusive. Handy v. Delaware Trust Co., 285 U.S. 352 (1932); Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). Such a rule cannot stand consistent with the decisions of the Court regarding due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted, July 15, 1981

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF
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APPENDIX A

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/Appellant,

v.

LOWER ELWHA TRIBE,
Plaintiff-Intervenor/Appellee,

v.

STATE OF WASHINGTON, et al.,
Defendants.

No. 79-4066

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Dec. 11, 1980

Decided March 23, 1981

Before WRIGHT and CANBY, Circuit Judges, and PATEL, District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

In 1855 the United States signed treaties with several Pacific Northwest Indian tribes, including the parties to

*Of the Northern District of California.

this appeal. The tribes agreed to live on reservations but reserved "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States."[1]

Earlier in this litigation, the Supreme Court rejected the contention that the treaties merely gave Indians an equal opportunity to try to catch fish. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674-85, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979). The Court held that the treaties reserved to the tribes the right of taking up to 50% of the harvestable fish on runs passing through usual and

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[1] Treaty of Point No Point, 12 Stat. 933, 934 (signed January 26, 1855; ratified, March 8, 1859; proclaimed, April 29, 1859). The Elwha Indians were a party to this treaty.

Substantially identical language appears in the Treaty with the Makah, 12 Stat. 939 (signed January 31, 1855; ratified, March 8, 1859; proclaimed, April 18, 1859).

accustomed grounds to satisfy tribal needs. Id. at 685, 99 S.Ct. at 3074.[2]

The initial district court decision by Judge Boldt determined that the Makah Tribe had usual and accustomed fishing grounds on much of the northern Olympic Peninsula. United States v. Washington, 384 F.Supp. 312, 364 (W.D.Wash.1974), aff'd, 520 F.2d 676, 682 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97.[3]

The present dispute arose when the Makah and Lower Elwha Tribes both claimed

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[2] See generally Case Note, Fishing Vessel Association: Resolution of Indian Fishing Rights under Northwest Treaties, 16 Willamette L.Rev. 931 (1980).

[3] The district court retained jurisdiction after the cited phase of the case to determine the many complex issues that remained and to ensure enforcement. The core of the initial decision was ultimately upheld by the Supreme Court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685, 99 S.Ct. 3055, 3074, 61 L.Ed.2d 823 (1979). For the full history of the case, see Case Note, supra note 2.

rights to fish in certain areas initially found to be Makah fishing grounds. The Lower Elwha Tribe contended that it, rather than the Makah Tribe, had primary Indian fishing rights in its aboriginal territory east of the Hoko River. The Lower Elwha also sought joint fishing rights on the Hoko, which at treaty times separated the two tribes.

The district court found that the disputed areas were usual and accustomed fishing grounds of both tribes. United States v. Washington, 459 F.Supp. 1020, 1049, 1066. But it found that the treaty-time Elwha Tribe had the right to preclude Makah fishing east of the Hoko and that the present-day Lower Elwha could exercise the same right. Id. at 1066-68. The court also found that the treaty-time Makah controlled fishing west of the Hoko and that the Hoko was subject to joint use and

control. Fishing rights in these places were allocated accordingly. Id. at 1067.

On appeal, the Makah Tribe challenges the district court's findings concerning treaty-time rights. The Tribe further contends that, even if the Lower Elwha had the right at treaty time to exclude the Makah from areas east of the Hoko, that right is not protected by treaty and is not enforceable now in federal court.

I.

The district court's findings of fact must be upheld unless they are clearly erroneous. Fed.R.Civ.P. 52(a).

A. Rivers East of the Hoko

The finding that the Lower Elwha Tribe controlled fishing east of the Hoko River rests primarily on the testimony of Dr. Barbara Lane, an anthropologist. She testified that the treaty-time Elwha occupied the area east of the Hoko and considered it their territory.

She stated that the prevailing conception of tribal territory among Northwest Indians comprised the right to exclude members of other tribes.[4] She conceded that Makahs fished east of the Hoko, but maintained that this fishing, to be consistent with the Indian conception of tribal territory, had to be with the express permission of the Elwha or by virtue of intermarriage.

The Makah Tribe denies that its fierce ancestors would have deigned to ask permission to fish in Elwha territory and contends that the district court's determination is wholly unsupported by the record

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[4] Dr. Lane amplified this principle by identifying four specific factors to be considered in determining whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers, (2) frequency of use and relative importance to the tribe, (3) contemporary conceptions of control or territory, and (4) evidence of behavior consistent with control.

because the court relied on an "anthropologica' principle" rather than specific facts.

The Makah contention is without merit. Historical evidence of tribal custom is a proper basis for judicial conclusions about the present effect of Indian treaty provisions. See United States v. Top Sky, 547 F.2d 486, 487 (9th Cir. 1976). Here, it may be the only probative evidence available.[5]

The Makah point to an incident reported by a nineteenth century journalist, James Swan, in which several Makah fishermen went fishing in Elwha territory and beheaded the Elwha Indians who tried to

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[5] Even if Dr. Lane's conclusions about the customary rights of a tribe in its territory were not probative of rights actually exercised, they would be probative of the reasonable expectations of the treaty signatories.

stop them.[6] The significance of this incident is unclear, and it is not necessarily inconsistent with Lane's testimony that only the Elwha had a recognized right to fish in Elwha territory.

B. The Hoko River

Anthropological evidence established that the Hoko River was subject to joint use and control in treaty times. Contending that the Hoko should be subject to their exclusive control, the Makah relied on the testimony of an archaeologist who said he found Makah baskets about 2,000 years old at the Hoko River.

Judge Boldt found the anthropolgist's interpretation more persuasive. He noted that the archaeological evidence had nothing to do with use of the Hoko River at treaty times and, at most, proved only that

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[6] J. Swan, Almost Out of the World: Scenes from the Washington Territory, the Straits of Juan de Fuca, 1859-1861 (defendants' exhibit).

Makah baskets had once been used at the Hoko. They could have been obtained through trade or used by the Makah wives of Elwha Indians. In any event, Makah presence on the Hoko is not inconsistent with Elwha presence there.

C. Substantial Evidence

We conclude that the district court's factual determination was supported by substantial evidence and was not clearly erroneous.

II.

The Makah Tribe insists that considerations of law and equity require that it be allowed to share the rivers east of the Hoko even if the district court correctly determined that treaty-time Elwha Indians had a right to control the fishing places in Elwha territory. The Lower Elwha Tribe points out that the Makah Tribe has access to several rivers and to marine

waters. More to the point, hardship to the Makah cannot deprive the Elwha of vested treaty rights.

The treaties "secured", or reserved, to the tribes their pre-treaty rights to take fish. United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); accord, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 685, 99 S.Ct. at 3070.[7] In defining the scope of these rights, the treaties "must be construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Id. at 676, 99

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[7] In United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed.2d 1089 (1905), the Supreme Court addressed the Pacific Northwest fishing treaties and observed that they did not create the fishing rights asserted but reserved pre-existing rights. The rights themselves were derived from aboriginal possession. See F. Cohen, Federal Indian Law 593 (rev.ed.1958).

S.Ct. at 3067 (quoting Jones v. Meehan, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899)).

We may infer that the tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty.[8] The pre-treaty Elwha Tribe claimed and exercised the primary right to take fish on the rivers east of the Hoko within its territory. Members of the Makah Tribe fished on those rivers only by permission, through intermarriage, or on illicit incursions into Elwha Territory.

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[8] The district court earlier held that when fish runs extend through the usual and accustomed grounds of more than one tribe, disputes among the tribes shall be resolved by the tribes themselves. 384 F.Supp. at 417; see 443 U.S. at 671, 99 S.Ct. at 3067.

Here, however, the issue is primary control of Indian fishing grounds, not sharing of fish runs that pass the accustomed fishing grounds of more than one tribe.

(Footnote 8 continued next page)

These instances of Makah fishing on Elwha territory do not destroy the Elwha Tribe's primary right. Cf. Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Eastern Land Claims, 31 Maine L.Rev. 17, 70 (1979) ("[t]emporary occupancy by friends or raiding by enemies does not destroy the exclusive occupancy required for aboriginal title" under 25 U.S.C. § 177 once exclusive occupancy has been established).

We conclude that the Lower Elwha Tribe is entitled to exercise the primary Indian fishing right on the disputed rivers east of the Hoko and that Makah fishing in that

(Footnote 8 continued)

We see no inconsistency in holding that the treaties secure the Elwha Tribe's primary right vis-a-vis other tribes to fish in its aboriginal territory while they do not mandate a precise formula for sharing fish runs that pass through other territory.

area is subject to Elwha permission. The Hoko River remains a joint fishery. These are the "right[s] of taking fish" that were secured by the treaties, and these are the rights enforceable today.

AFFIRMED.

DISTRICT COURT OPINION
(Reported at 459 F.Supp. 1066)

UNITED STATES OF AMERICA, et al.,
Plaintiff,

v.

STATE OF WASHINGTON, et al.,
Defendant.

Civ. No. 9213

United States District Court

W.D. Washington at Tacoma

March 10, 1976

ORDER RE MAKAH TRIBE'S REQUEST FOR RECONSIDERATION OF LOWER ELWHA USUAL AND ACCUSTOMED FISHING PLACES

(March 10, 1976)

The essence of this dispute is the fact that the court in its rulings has recognized usual and accustomed fishing areas for use by both the Makah Tribe and the Lower Elwha Band. The Makah objections to the Lower Elwha regulations are a result of the tribes promulgating fishing regulations for common areas which are not identical.

The adjudicated usual and accustomed fishing places of the Makah Tribe are specified in Finding of Fact # 65 (384 F.Supp. at 364).

The adjudicated usual and accustomed fishing places of the Lower Elwha Band of the Clallam Indian Tribe are contained in paragraph 3 of the Order and Decree re Herring Fisheries entered April 18, 1975[18] (p. 1049 supra). Those findings are hereby confirmed subject to the conditions specified in this order.

The Lower Elwha Band also claims additional marine and river areas as usual and accustomed fishing places[19] but the

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[18] No party has contested the assertion of the Lower Elwha Band that the herring usual and accustomed fishing places specified in the court's order are the same for the taking of anadromous fish.

[19] Specifically, "* * * the waters of Northern Puget Sound around the San Juan Islands, Whidbey Island and other places in Haro and Rosario Straits * * *" (Lower Elwha Memo p. 15).

court declines to rule or consider such claims at this time.

The common fishing areas of the Makah Tribe and the Lower Elwha Band are as follows:

> The marine waters of the Strait of Juan de Fuca east to Port Crescent (near Port Angeles) and the rivers and streams along the Strait of Juan de Fuca from the Hoko River east to the Lyre River, including the Pysht River and Twin River.

There is no dispute with respect to Makah and Lower Elwha fishing in common marine areas. The dispute concerns which of the tribes has fishing rights on the common rivers (Hoko, Pyst, Twin and Lyre) which are primary to the rights of the other tribe, to the extent that one tribe may control or preclude fishing by the other on those rivers.

The Lower Elwha Band contends that joint fishing between the tribes should take place on the Hoko River and that all rivers east of the Hoko were historically within Clallam-controlled lands and, therefore, any Makah fishing rights on those rivers should be subject to the permission of the Lower Elwha Band.

The Makah Tribe contends that its "modus operandi" at treaty times[20] precludes this court from making the Makah Tribe's right to fish the Hoko and rivers east thereof subject to the control and regulation of the Lower Elwha Band.

The testimony and reports of Dr. Barbara Lane have been found on numerous

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[20] Counsel asserts that the Makah were war-like and aggressive in nature, "that Makah Elders have strong memories of fishing on rivers east of the Hoko," that the Makah have continuously and vigorously defended their fishing rights in court actions and that the Makah were "commercial middlemen in coastwise and Straits trade at Treaty times." (Makah memo p. 3)

occasions to be highly credible and well researched and justify reliance thereon by the court. Her testimony in this matter establishes that some form of a joint fishery existed on the Hoko River between the two tribes, that east of the Hoko River was Clallam territory over which the Clallams exercised some control and that any Makah fishing on rivers within the Clallam territory was due to kinship, individual in nature and based upon intermarriage, or a grant of permission. The concept of territorial control with instances of permissive use, as asserted herein, is "the generally accepted view of people concerned with ethnography of this area" and is a conclusion supported by the evidence. (Tr. Aug. 6, 1975, pp. 151-171.)

Upon a full and careful examination and consideration of the briefs, exhibits and transcripts of the testimony taken on July 30 and August 6, 1975, the court

concludes: (1) that the Makah Tribe and the Lower Elwha Band should exercise a joint fishery, wherein neither tribe shall exercise control or regulation over the other, on the Hoko River but that Makah fishing on rivers or streams east of the Hoko to Port Crescent shall be subject to the control and regulation, as defined above, by the Lower Elwha Band of the Clallam Indian Tribe; (2) the Lower Elwha fishing on the Sekiu River shall be subject to the control and regulation by the Makah Indian Tribe; (3) a joint fishery as defined above shall exist with respect to Makah and Lower Elwha fishing in the marine waters of the Strait of Juan de Fuca.

If any disputes arise with regard to the joint fishery, the matter shall be referred to the Northwest Indian Fisheries Commission for hearing, upon notice and oral presentation by the parties; the

decision of the commission and written findings of fact and conclusions of law, if requested by the parties, may be reviewed by the court, or Special Master, and will be rejected or modified only when the decision and findings and conclusions, if any, are clearly erroneous.

The court is convinced that the best interests of both tribes will best be served by reasonable and equitable consideration of each tribe by the other.[21]

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[21] The Makah Tribe subsequently moved, pursuant to Rule 60(b)(2) Fed.R.Civ.P., for a rehearing to consider newly discovered evidence. The motion was granted September 10, 1976. The evidence pertained to new archeological diggings along the Hoko River and whether the artificats uncovered there indicated prehistoric occupation and control of that river by the Makah or Clallam Tribe or both and whether that would affect the prior findings concerning control at the time of the 1855 treaties. Following the rehearing the court stated orally that the March 10, 1976, Order was still applicable unless and until modified. On November 28, 1978, the court denied the motion for relief from the prior judgment and affirmed the March 10, 1976, order.

DISTRICT COURT OPINION
(Reported at 459 F.Supp. 1048)

UNITED STATES OF AMERICA, et al.,
Plaintiff,

v.

STATE OF WASHINGTON, et al.,
Defendant.

Civ. No. 9213

United States District Court

W.D. Washington at Tacoma

March 28, 1975

and

April 18, 1975

ORDERS RE HERRING FISHERIES AND DETERMINATION OF USUAL AND ACCUSTOMED FISHING PLACES OF ADDITIONAL TRIBES

(March 28, 1975, and April 18, 1975)

The defendants Department of Fisheries and Department of Game have filed a Request for Determination re Nonanadromous Fish and certain tribes have filed Requests for Determination of Right to Engage in Herring and/or Herring Roe Fisheries. The court makes the following determinations:

The subject matter of the original trial in this action was limited to off-reservation treaty Indian fishing rights in the case area and the application of said rights to anadromous fish resources. (See FPTO § 5 and C.L. #7, 384 F.Supp. at 400).

The court has, however, expressly retained continuing jurisdiction to assure implementation of the court's rulings and to deal with environmental issues and other relevant matters. (See 384 F.Supp. at 347 and C.L. #48, 384 F.Supp. at 405). Issues relating to fishing outside of the case area, on-reservation fishing, or non-anadromous fishing are clearly within the subject matter jurisdiction of this federal district court (see F.F. #11 and C.L. #21, 384 F.Supp. at 352 and 401) so that that litigation with respect to such issues could clearly be brought before this court in separate actions. However, equity

favors prevention of a multiplicity of actions, Camp v. Boyd, 229 U.S. 530, 33 S.Ct. 785, 57 L.Ed. 1317 (1913), and in the opinion of this court, proper exercise of its jurisdiction permits, and efficient administration of justice requires, this court to deal with matters related to, but not included within, Final Decision #1 such as possible treaty-right nonanadromous fishing.

The court, having thoroughly considered all of the pleadings, testimony, evidence, memoranda and oral arguments, HEREBY FINDS, ORDERS AND DECREES AS FOLLOWS:

1. The Intervenor-plaintiff Upper Skagit Tribe's oral motion to withdraw, without prejudice to its subsequent resubmission, its Request for Determination as to its treaty entitlement to fish for herring, to which motion no objection was made, is granted.

2. The Intervenor-plaintiffs Lower Elwha Tribe, Lummi Tribe, Muckleshoot Tribe, Nisqually Tribe, Nooksack Tribe, Port Gamble Band of Clallam, Puyallup Tribe, Skokomish Tribe, Squaxin Island Tribe, Suquamish Tribe and Swinomish Tribal Community have each made a prima facie showing, on the basis of evidence that was not controverted, of their treaty-secured right to take herring at their respective usual and accustomed fishing places and it is HEREBY DECREED, subject to reconsideration as specified in paragraph 8 hereof that each of said tribes has the right under such of the treaties referred to in Final Decision #1 in this case as have heretofore been held to apply to said tribe, to take herring at all of its usual and accustomed fishing places to the same extent and subject to the same terms and conditions as specified in Final Decision #1 with respect to the right of taking

anadromous fish and subject further to the provisions of paragraph 7 below.

3. The usual and accustomed fishing places of the Lower Elwha Tribe include all of the streams draining into the Strait of Juan de Fuca from the Hoko River east to the mouth of Hood Canal and the waters of the Strait of Juan de Fuca.

4. The usual and accustomed fishing places of the Nooksack Tribe include the Nooksack River and its tributaries, Bellingham Bay, Chuckanut Bay, Birch Bay, Semiahmoo Bay and Semiahmoo Spit and surrounding marine waters.

5. The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

6. The usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.

7. Although Indians from several Puget Sound area tribes, including specifically those which were predecessors in interest to the Swinomish Tribal Community, regularly and customarily used Hale Passage adjacent to Lummi Island for travel and fishing before, during and after treaty times, said Passage was an area over which the Lummi Tribe exercised and was acknowledged by many others to have primary control as regards fishing or other re-

source gathering and occupancy. Prior to the hearing in this case the Lummi, Nooksack and Suquamish Tribes without relinquishing any claims to fishing locations, agreed for the present time to resolve any differences on this matter among themselves and not to request a court determination as to their relationship with each other in this area. As to the Swinomish Tribal Community, the court finds that its treaty-right fishing in said Hale Passage is subject to the permission of the Lummi Tribe.

8. The findings and determinations made in paragraphs 2 through 7 above are made on the basis of a prima facie showing as heretofore provided and each is subject to reconsideration on the basis of a full evidentiary hearing if requested by any party by written request filed on or before May 19, 1975. If no such reconsideration is requested within said time as to any

such finding or determination, the latter shall become final and reviewable as provided by 28 U.S.C. §§ 1291 and 2201 without further order of this court.[7]

9. The treaty tribes found by this court to be entitled to participate in the herring sac-roe fishery in northern Puget Sound waters on the one hand, and the nontreaty fishermen entitled to participate in said fishery pursuant to state law on the other hand, are each entitled to take 50% of the off-reservation harvestable amount of herring.

[The March 29 and April 18, 1975, orders also contained provisions applicable to the conduct the 1975 herring fisheries. These are omitted here in view of the

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[7] The only such request was by the Makah Tribe with respect to the usual and accustomed fishing places of the Lower Elwha Tribe, paragraph # 3, supra. See court's order of March 10, 1975, p. 1066 infra.

subsequent approval of an interim plan for management of future herring fisheries. P. 1063 *infra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,
Plaintiffs,
and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/
Appellant,

v. No. 79-4066

LOWER ELWHA TRIBE, DC CV 9213
Plaintiff-Intervenor/ GHB
Appellee,

v.

STATE OF WASHINGTON, et al.,
Defendants

APPEAL from the United States District Court for the Western District of Washington.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 23, 1981.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	) CIVIL NO. 9213 - PHASE I) ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MAKAH v LOWER ELWHA DISPUTE RE: HOKO RIVER

The court has fully reviewed and carefully considered all the evidence of the parties submitted in connection with the above entitled matter including the testimony of the witnesses presented at a hearing held November 29, 1976. The request of the Makah tribe for an additional hearing is hereby denied. None of the evidence offered changes the court's prior conclusion that the Hoko River was an area of joint occupation between the Makahs and Lower Elwhas. Accordingly, the court's prior ruling on this issue should not be modified.

The court has fully considered all proposed findings of fact and conclusions

of law and those which have not been adopted are rejected as repetitious, argumentative, inaccurate or contrary to the rulings of the court, either in whole or in part.

Every finding of fact that may be a conclusion of law is adopted as such.

FINDINGS OF FACT

1. The Makah's Motion for Reconsideration was granted to allow the Makah Tribe to present newly discovered archeological evidence relating to the question of control of fishing on the Hoko River. The issues as defined by the Makah Tribe did not include a consideration of rivers other than the Hoko River (Tr. Nov. 29, 1976, p. 81; Makah Memorandum in Support of Relief from Final Order, August 17, 1976, pp. 1-3), and the Lower Elwha Tribe duly preserved its objections to evidence relating to other rivers east of the Hoko River. (Tr. Nov. 29, 1976, pp. 2,75).

2. Anthropological evidence was presented by Dr. Barbara Lane for the Lower Elwha Tribe and Mr. Dale Croes for the Makah Tribe. The testimony of each has been thoroughly studied and considered by the court. In considering the credibility of each, the court took into consideration the fact that Mr. Croes has limited experience as an ethnohistorian, and has spent the previous five years emersed in archeological field work at the Hoko and Ozette Rivers. (Tr. Nov. 29, 1976, p. 7). Dr. Lane has had extensive contact and experience with ethnohistorical research and archeology. (Tr. Nov. 29, 1976, p. 126). The court finds that on the question at issue in this proceeding, namely control over treaty-time fishing on the Hoko River, the testimony of Dr. Lane is more credible and convincing than that of Mr. Croes.

3. The archeological evidence presented related to basket remnants excavated from an archeological wet site located on the Hoko River. (Ex. MK 13; Tr. Nov. 29, 1976, p. 10). Mr. Croes attempted to correlate various basket weave techniques and other artificats found, with occupancy and control of the Hoko River. (Tr. Nov. 29, 1976, pp. 88, 90-91, 117, 119).

4. Basket remnants found in archeological digs are not conclusive of what people were responsible for making the baskets. (Tr. Nov. 29, 1976, pp. 26, 88). Even if one can establish that a particular basket technology can be considered predominately of one Indian type or another, that fact does not demonstrate that a particular group was in fact the dominant resident of a particular area. (Tr. Nov. 29, 1976, p. 91; "An Early 'Wet' Site on the Mouth of the Hoko River Site" (48CA213) p. 224).

5. There is not a uniform basketry technology with all Salish people. Basket technology varied from the Fraser River to Puget Sound. (Tr. Nov. 29, 1976, pp. 144-145). There have been no wet site excavations done within Clallam territory and therefore it is difficult to compare the baskets found at the Hoko River with the baskets generally made by Clallam people. It is not appropriate to compare such baskets with such general Salish basketry given the difference between the baskets involved. (Id.)

6. At treaty times the Clallam Indians had a village, which may have been a permanent village, at the Hoko River (Ex. USA 91 (Lane Report on Lower Elwha), pp. 4-7; Aug. 6, 1975, p. 155). In 1854, a year prior to the treaty, Gibbs listed the Hoko as the site of the Clallam village. (Ex. USA 91, supra pp. 5-7). Waterman, writing on the Clallams indicated that the

Clallams had a fishing site at the Hoko River. The Hoko River is named in the Treaty of Point No Point as the location of a Clallam village. There is evidence that the Makah people also utilized the Hoko River as a seasonal fishing village. (Tr. Nov. 29, 1976, p. 87).

7. The archeological evidence did not establish whether the Makah fished with Lower Elwha permission on rivers east of the Hoko River. (Tr. Nov. 29, 1976, p. 83). Similarly, the archeological evidence did not establish or assist in the determination of whether the Makah controlled the Hoko River fishing. (Tr. Nov. 29, 1976, p. 100). The archeological evidence showed that the Makah "occupied" the Hoko River in prehistoric times., (Id.) but did not necessarily show occupancy at treaty times. (Tr. Nov. 29, 1976, p. 122).

8. Ethnohistorical evidence presented was the same as that presented at the July

30, and August 6, 1975, hearings. A re-evaluation of this extant evidence was undertaken by the Makah. (Tr. Nov. 29, 1976, pp. 76-78, 83). Dr. Lane provided an extensive examination of all the information presented. (Tr. Nov. 29, 1976, pp. 126-127, 129, 130, 152-157). Fishing on the Hoko River was exercised jointly by the Lower Elwha and Makah tribes. (Tr. Nov. 29, 1976, pp. 131-132). On the rivers east of the Hoko River fishing was controlled by the Lower Elwha. (Tr. Nov. 29, 1976, p. 152).

CONCLUSIONS OF LAW

There having been no testimony or other evidence presented to this court which would support a modification of this court's March 10, 1976, order, that order is affirmed in all respects and particulars. The court's March 10, 1976, findings of fact and conclusions of law are hereby

incorporated by reference and made a part of this order. The Makah's Motion for Relief from Judgment is denied.

IT IS HEREBY SO ORDERED this 28th day of November, 1978.

/s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al,	CIVIL NO. 9213 - PHASE I
Plaintiffs,	
v.	ORDER GRANTING MOTION FOR RELIEF FROM ORDER RE: MAKAH v. LOWER ELWHA DISPUTE
STATE OF WASHINGTON, et al.,	
Defendants.	

Upon full consideration the court hereby grants the motion of the Makah tribe for an order vacating and setting aside this court's Order of Dismissal entered August 23, 1978, dismissing with prejudice the motion of the Makah tribe for relief from this court's order of March, 1976, re: Makah v. Elwha Dispute Re: Usual and Acustomed Fishing Areas.

Accordingly, counsel for the Makah tribe shall serve and file on or before October 16, 1978, fully annotated proposed findings of fact and conclusions of law.

Counsel for the Lower Elwha tribe shall serve and file responsive proposed findings of fact and conclusions of law on or before October 27, 1978.

Counsel for the Makah tribe may reply on or before November 3, 1978.

IT IS HEREBY SO ORDERED this 5th day of October, 1978.

/s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATE OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	CIVIL NO. 9213 Phase I ORDER RE DISMISSAL OR REFERRAL OF MISCELLANEOUS PENDING MATTERS

(Excerpt)

On July 25, 1978, this court notified all parties that a number of matters that were the subject of pending motions or requests for determination had been inactive for prolonged periods of time. The court directed that interested parties submit their views concerning further action on, or the disposition of, such matters by August 8, 1978.

On the basis of the replies submitted, the diligence of prosecution of such matters, and the records of this case,

the court hereby orders as follows with respect to the items mentioned herein. (Paragraph numbers correspond to the number of the item in this court's order of July 25, 1978):

. . .

4. The following matters are hereby dismissed for lack of diligent prosecution with prejudice to right of movant to resubmit them at a future date:

#4. Makah's Motion for Relief from Courts's Order of March 19, 1976, re: Makah v. Elwha Dispute of Usual and Accustomed Fishing Areas.

. . .

IT IS HEREBY SO ORDERED this 22nd day of August, 1978.

s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiff,	)	No. 76-2516
MAKAH INDIAN TRIBE, Plaintiff-Intervenor-Appellant,	)	ORDER
vs.	)	
STATE OF WASHINGTON, et al., Defendants-Appellees.	)	

Before: BROWNING and HUFSTEDLER, Circuit Judges.

Upon due consideration of the motion to remand, this appeal is hereby remanded to the district court.

/s/
JUDGE BROWNING

/s/
JUDGE HUFSTEDLER

U.S. Circuit Judges

Mo Cal 10/26/76

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiff,	
MAKAH INDIAN TRIBE, Plaintiff-Intervenor-Appellant,	No. 76-2516
vs.	ORDER
STATE OF WASHINGTON, et al., Defendants-Appellees.	

Before: BROWNING and KENNEDY, Circuit Judges

Upon due consideration of appellant's motion all further proceedings are stayed for thirty (30) days or until the district court rules on appellant's motion for relief, whichever occurs first.

/s/

/s/

U.S. Circuit Judges

Mo Cal 9/13/76

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiff,	)	
	)	CIVIL NO. 9213
vs.	)	
STATE OF WASHINGTON, et al.,	)	FINDINGS AND ORDER
Defendants.	)	

Having considered Plaintiff-intervenor's motion made pursuant to Fededral Rule of Civil Procedure 60 (b) (2) and in conformity with the procedure outlined by the Court of Appeals for the Ninth Circuit in Greear v. Greear, 288 F.2d 466 (9th Cir. 1961) and Creamette Co., v. Marlino, 289 F.2d 569 (9th Cir. 1961):

1. I hereby find that in the interests of justice the Plaintiff-intervenor Makah Tribe should be relieved from the final order of this Court dated March 10,

1976, and a new hearing should be held in order to enable this Court to consider newly discovered archaeological evidence as outlined in Plaintiff-intervenor's motion.

2. Therefore, it is hereby ORDERED that if the Court of Appeals for the Ninth Circuit remands case No. 76-2516 to this Court, Plaintiff-intervenor's Rule 60 (b) (2) motion will be granted and a new hearing ordered to consider said newly-discovered evidence.

DONE IN OPEN COURT this 10 day of September, 1976.

/s/
HONORABLE GEORGE H. BOLDT, SR.
U.S. District Court Judge

Presented by:

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

/s/
Mason D. Morisset of Attorneys
for Plaintiff-Intervenor
Makah Indian Tribe

APPENDIX C

TREATY WITH THE MAKAH, 1855.
12 Stat. 939
Ratified March 8, 1859

Articles of agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah tribe of Indians, viz: Neah Waatch, Tsoo- Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

ARTICLE 1. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly

along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately ceded to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a

straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE 3. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year

after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 4. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 5. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the

President of the wishes of said Indians in respect thereto.

ARTICLE 6. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted there-

by, remove them from said reservation to such suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

ARTICLE 8. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

ARTICLE 9. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of said citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case

of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

ARTICLE 10. The above tribe is desirous to exclude from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in

common with those of the other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter and farmer for the like term to instruct the Indians in their respective occupations. Provided, however, That should it be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

ARTICLE 12. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

ARTICLE 13. The said tribe finally agrees not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

ARTICLE 14. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned, chiefs, headmen and delegates of the tribe aforesaid have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

[Signed]

TREATY OF POINT NO POINT, 1855
12 Stat. 933
Ratified March 8, 1859

Articles of agreement and convention made and concluded at Hahdskus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz: Kah-tai, Squah-quaihtl, Tch-queen, Ste-teht-lum, Tsohkw, Yennis, Elh-wa, Pishtst, Hunnint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz: Commencing at the mouth of the Okeho River, on the Straits of Fuca; thence southeastwardly along the westerly line of territory

claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still sotheastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians, to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz: The amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE 3. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 5. In consideration of the above cession the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian

affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 6. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or

bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the

said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to

be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 12. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 13. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 14. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

[Signed]

APPENDIX D

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UNITED STATES v. WASHINGTON

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CLERK

NO. 81-115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

MAKAH INDIAN TRIBE,
Plaintiff-Intervenor/Petitioner,

v.

LOWER ELWHA TRIBE
Plaintiff-Intervenor/Respondent,

v.

STATE OF WASHINGTON, et al.,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 12, 1981

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NO. _____

IN THE

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MAKAH INDIAN TRIBE,
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Plaintiff-Intervenor/Respondent,

v.

STATE OF WASHINGTON, et al.,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE[1/]

A. Procedural History

The District Court found five rivers

1/ The Lower Elwha Tribe finds it necessary to
(footnote continued on next page)

to be within the usual and accustomed fishing grounds of both the Lower Elwha Tribe and the Makah Tribe. This dispute concerns the respective rights of the two tribes to control fishing on four of those rivers. After two evidentiary hearings and two separate proceedings, the District Court rejected the claims of the Makah Indian Tribe.

After determination of the Lower Elwha usual and accustomed fishing grounds,[2/] the Makah Tribe requested that a determination be made that Lower Elwha fishing in all rivers also within Makah

---

supply a new Statement of the Case because of the omissions and inaccuracies of the Petitioner. Supreme Court Rule 34.2. The Makah Tribe's Statement of the Case not only fails to mention the evidence relied upon by the courts below, it contains repeated conclusions, statements and inferences which are not, and can not be supported by the record.

2/ Order Re Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes, 459 F.Supp. at 1048, 1049, Appendix A-21. [References to the Appendix refer to the Appendices of the Petition for Writ of Certiorari.]

usual and accustomed areas be subject to Makah permission. Motion for Preliminary Injunction, filed October 7, 1975, Docket Number 1453. Evidence regarding this claim was presented in hearings held on July 30 and August 6, 1975. After those hearings the Makah Tribe abandoned its claim that it could prohibit Lower Elwha fishing on rivers within Lower Elwha territory (the Elwha, Lyre, Twin and Pysht Rivers), and then claimed an equal right to fish on those rivers.

The Makah Tribe maintained its claim to control fishing on the Hoko River and the Sekiu River. The Lower Elwha Tribe took the position that it controlled the rivers east of the Hoko, and that the Hoko was a joint use area.

The court concluded that the Makah Tribe controlled fishing in the Sekiu River (this had never been challenged by the Lower Elwha Tribe), that the Hoko

River was a joint use area, not subject to either tribes' control, and that all rivers east of the Hoko were controlled by the Lower Elwha Tribe. It further limited the eastward boundary of the Makah usual and accustomed fishing grounds to exclude the Elwha River (which flows through the Lower Elwha Reservation). Order Re Makah Tribe's Request for Reconsideration of Lower Elwha Usual and Accustomed Fishing Places, 459 F.Supp. 1066-1068 (W.D.Wash., March 10, 1976) (Appendix A-14).

Before the Makah Tribe's appeal of the district court's March 10, 1976 Order was heard, the Makah Tribe was granted a motion for a new hearing, pursuant to Fed.R.Civ.P. 60(b)(2), and the case was remanded. Appendix B-14. The basis for the motion was an allegation that substantial new archaeological evidence had been discovered to support the Makah claim

regarding the Hoko River. Makah Motion for Relief from Final Order, August 17, 1976, Docket Number 2353.

Two further days of hearings were then held, with an anthropology student, Mr. Dale Croes, testifying for the Makah Tribe, on November 29 and 30, 1976. The Makah Tribe was ordered to prepare proposed findings and conclusions for response by the Lower Elwha Tribe. When those had not been filed by August 22, 1978, the district court dismissed the Makah Motion for Relief from Judgment, with prejudice, for lack of diligent prosecution. Order Re Dismissal or Referral of Miscellaneous Pending Matters, August 22, 1978, Docket Number 4852, Appendix B-12.

The dismissal order was vacated at the request of the Makah Tribe. Appendix B-10. The court then denied a Makah request for yet another hearing and

entered its "Additional Findings of Fact and Conclusions of Law Re Makah v. Lower Elwha Dispute Re Hoko River," November 28, 1978. Docket Number 5378, Appendix B-1. The court reaffirmed its earlier rulings, holding that the archaeological evidence was neither conclusive nor persuasive. The court further held that Dr. Lane, who had presented evidence supporting Lower Elwha control over Makah fishing and the joint nature of fishing on the Hoko River, was a more credible witness than Mr. Croes.

The Makah Tribe then renewed its appeal before the Ninth Circuit Court of Appeals, which affirmed the district court's decision in all respects. 642 F.2d 1141 (9th Cir. 1981), Appendix B-1.

B. Statement of Facts

During the district court proceedings, both tribes, and the court, treated

this dispute as a pure issue of fact. Evidence produced by both tribes was directed at the question of control of the rivers at the time of the treaties. At the hearings both tribes relied upon the testimony of Dr. Barbara Lane, an anthropologist who had testified for the United States and the tribes during the original trial in United States v. Washington and in many subsequent proceedings. Regarding her testimony in these proceedings the court stated:

> "The testimony and reports of Dr. Barbara Lane have been found on numerous occasions to be highly credible and well researched and justify reliance thereon by the court."

Order Re Makah Tribe's Request for Reconsideration of Lower Elwha Usual and Accustomed Fishing Places, 459 F.Supp. 1067, Appendix A-14, 17-18.

The evidence provided by the Lower Elwha Tribe established that, at the time

of the treaties, Makah fishing on rivers east of the Hoko was based upon kinship or intermarriage with members of the Lower Elwha Tribe, that the Lower Elwha Tribe controlled fishing on those rivers, and that both tribes freely used the Hoko River without control by either tribe. Dr. Lane testified that she used four factors to determine control over a fishery: (1) proximity of population centers to the fishery; (2) frequency of use by and relative importance to a tribe of a given fishery; (3) contemporary Indian and non-Indian conceptions of control or territory; and (4) evidence of behavior consistent with the idea of control over the fishery. 642 F.2d at 1143, n.4. Mr. Croes, the Makah witness, essentially agreed with this test. (Tr. Nov. 29, 1976, pp. 101, 105; Nov. 30, 1976, pp. 30, 36). The court held that:

> The concept of territorial

> control with instances of permissive use, as asserted herein, is the generally accepted view of people concerned with ethnography of this area and is a conclusion supported by the evidence. (Tr. Aug. 6, 1975, pp. 151-171).

459 F.Supp. at 1067.

Evidence was presented with respect to each of the four factors, confirming Lower Elwha control of the rivers east of the Hoko and joint use of the Hoko. With respect to the proximity of population centers, the evidence showed that there were Klallam villages located "on all of the major streams" east of the Hoko River. Tr. Aug. 6, 1975, p.157. There was also evidence of a Klallam village on the Hoko River, although the exact nature of the village was not fully determined. Tr. Nov. 29, 1976, pp. 131-132.

The evidence established that the Lower Elwha relied much more heavily on salmon and steelhead than the Makah, and

that their primary source was the rivers, unlike the Makah. Salmon and steelhead were of only secondary importance to Makah, as a change of diet, because they relied primarily on halibut, and to a lesser extent, seal and whale. Ex. U.S. 21 at 11, 20, 32. 384 F.Supp. at 363, FF 61. When Makah did take salmon, they primarily used the ocean or the Strait of Juan de Fuca, not the rivers. Ex. U.S. 21 at 22-23.

On the other hand, salmon and steelhead taken from the rivers were the staple food for Lower Elwha. Ex. U.S. 91 at 10. Every Klallam river and stream had at least one salmon trap. Ex. U.S. 91 at 13.

Treaty time descriptions and conclusions regarding Klallam society also substantiated Lower Elwha control east of the Hoko. George Gibbs, a lawyer and ethnographer, and an observer and advisor to the commission which drafted the

treaties, identified the Hoko River as the site of a Klallam village, Ex. U.S. 91 at 5. Along with James Swan, an historian, he considered the Pysht, Lyre and Elwha Rivers to be within the Klallam domain. Ex. U.S. 91 at 3-8. The Makah Tribal Council, in a 1941 list of fishing sites prepared from information supplied by tribal members, identified the Sekiu and Hoko Rivers as being areas where fishing was done both in the river and off the mouth of the river in the Strait of Juan de Fuca. For the Lyre River area, however, fishing was listed only off the mouth, in the Strait, not in the river itself. No mention was made of other rivers east of the Hoko. Ex. U.S. 21 at 11 (the list is Appendix I to Dr. Lane's report).

Contrary to Petitioner's perceptions of the notorious incident described by

James Swan,[3/] that incident evidences behavior consistent with Elwha control and adds the final factor as support for the Elwha position. Swan describes his experience of being taken into Klallam territory by a small Makah party. He observed the increasing anxiety and fear of the Makah as the party proceeded eastward. One member of the party explained the cause of their uneasiness:

> ...[A] few years before, he had come up with a party of Mackahs to catch a salmon at this place [in Elwha territory].... The Elwhas were very insolent and refused to let them catch fish in their river. The Mackahs left, but during the night they returned, and while the Elwhas were asleep they attacked them, killing twelve men and taking prisoners all the women. They cut off their heads as trophies, and collecting the bodies together, covered them up with the boards and firewood, and made good their escape.

Id. at 90.

3/ In "Almost Out of the World: Scenes from the Washington Territory, the Straits of Juan de Fuca," 1859-61, pp. 86-90 (cited in Ex. U.S. 21 at 20.)

Although the Lower Elwha were murdered for refusing permission to fish, their refusal was honored in fact, as the Makah fled from the scene, rather than remain and fish. Their fear in returning to the area years later further showed their understanding that they were not free to fish those waters as a matter of right. As described by Swan, the Makah's fear was so great that they would not camp where they would be seen by Elwhas and would not permit fires to be built. Id. at 89, 91. Both Dr. Lane and, prior to the Petition for Certiorari, counsel for the Makah, have interpreted this incident as meaning that the Klallams "evidently refused some permission to fish" in the stream. Tr. Aug. 6, 1975, pp. 169-170.

Dr. Lane examined the evidence described above, as well as all the other evidence, drew upon her extensive exper-

tise in the customs and history of the Stevens treaty tribes, and concluded that the Lower Elwha controlled the rivers east of the Hoko. Tr. Aug. 6, 1975, pp. 157-162. From the determination of who used, occupied and controlled the rivers, she further defined the territory of the Lower Elwha Tribe. Tr. Aug. 6, 1975, p.153. In other words, contrary to Petitioner's claim, her definition of territory depended upon who exercised control in any given area; control of fishing did not depend on territory.

Dr. Lane found that the area east of the Hoko River was Lower Elwha territory, the area west of the Hoko River was Makah territory, and that the Hoko River was the boundary between the two. Dr. Lane concluded that Makah fishing in Lower Elwha territory resulted from kinship, intermarriage, or permission. She drew a similar conclusion regarding Klallam

rights in the Sekiu, where the Makah had urged the district court to find that they controlled the fishing. Tr. Aug. 6, 1975, p.159, 162.

In addition to the evidence regarding control, evidence was also presented which established the practice of intermarriage between Lower Elwha and Makah. Dr. Lane testified that "Makah women very often married Clallam men," Tr. Nov. 30, 1976, p.42, and "there has been for several generations intermarriages between Clallam and Makah," Tr. Nov. 19, 1976, p.130.

Finally, the evidence established that both Makah and Lower Elwha were powerful tribes. In 1854, George Gibbs described the Klallam as "the most formidable tribe now remaining," Ex. U.S. 91 at 5, and an historian, Waterman, described the Klallam as "more vigorous than the tribes on Puget Sound," S'Klallam

Tribe of Indians v. United States, 5 Indian Claims Commission 680, 684 (1957). The Makah also being a powerful tribe, with a reputation for being fierce and difficult, Ex. U.S. 21 at 26, relations between the tribes were at time unfriendly. Ex. Mk-2.

II. SUMMARY OF ARGUMENT

There are three primary reasons why certiorari should not be granted. First, the real dispute in this case is over findings of fact for which there is substantial evidence. Second, there is no error of law because the court based its determination of control over fishing upon the evidence, not a presumption, and because tribal rights to control fishing inter se must be determined under the reserved rights doctrine as of the time of the treaties. Finally, no substantial federal question over which federal courts

are in disagreement is presented by this essentially factual dispute.

III. ARGUMENT

A. The Findings Of The District Court Are Supported By Substantial Evidence And Are Not Clearly Erroneous.

The primary contention of the Petitioner Makah Tribe is that the district court was incorrect in determining that, at treaty times, the Lower Elwha Tribe controlled fishing east of the Hoko River and that both tribes had a joint fishery on the Hoko River. At two separate proceedings in the district court the Makah Tribe attempted to present evidence regarding the respective rights of the tribes at treaty times. This factual question was resolved against them in the district court, despite their repeated opportunities to show otherwise. That factual determination may not be set aside

unless it is shown to be clearly erroneous. Fed.R.Civ.P. 52(a). The Court of Appeals found that the factual determination was supported by substantial evidence and not clearly erroneous. 642 F.2d 1141, 1143; Appendix A-1, 9.

The Makah Petition's Statement of the Case and Argument are devoted to a large extent to challenging the Findings of Fact of the district court. For example, the Makah Petition states "No finding was made, nor evidence presented in the underlying case, that the Makahs fished these rivers or set up their fall camps in any way other than freely and by virtue of right." Petition, pp. 9-10. This ignores the evidence supplied by Dr. Lane, and the findings of the court, that any Makah fishing there was not as of right, but by kinship, intermarriage or permission. Tr. Aug. 6, 1975, pp.159, 162; 459 F.Supp. 1066, 1067, Appendix A-

14, 18. At page 12 of the Petition, the Makah argue that certain factors "demonstrate that fishing on the Hoko was subject to the influence or control of the Makahs," citing the testimony of Dale Croes, Tr. Nov. 29, 1976, pp. 100-101, 105. The district court found that

> on the question at issue in this proceeding, namely control over treaty-time fishing at the Hoko River, the testimony of Dr. Lane is more credible and convincing than that of Mr. Croes.

Order of Nov. 28, 1976, Appendix B-2, 4. Dr. Lane testified that she saw "no evidence" that suggested that the Makahs had a right to exclude the Klallams from the Hoko River, and that

> ...if there is any preponderance one way or the other I am afraid it would be Clallam, not Makah.

Tr. Nov. 29, 1976, at 131-132.

The Makah Petition tries to sidestep the "clearaly erroneous" standard by asserting that the district court relied

upon an "anthropological principle" as an irrebuttable presumption, rather than on any specific facts. They argue that the court irrebuttably presumed control of the rivers from the fact that the rivers (east of the Hoko) were within Lower Elwha territory, characterizing the district court's holding as the alleged principle that "occupancy of territory means total control of fisheries." Petition, p.33.

Despite this "quotation," which is made without reference to its origins, neither the court nor Dr. Lane ever made that statement. The court and Dr. Lane's definition of a tribe's territory was based upon the evidence of which areas it controlled. This definition is in full accord with the rulings of the Indian Claims Commission that a condition precedent to a determination of a tribe's territory is evidence of sole control of the area. S'Klallam Tribe v. United

States, 5, Ind.Cl.Comm. 680, 703 (1957). Both that case and Makah Tribe of Indians v. United States, 23 Ind.Cl.Comm. 165 (1970), aff'd, 195 Ct.Cl. 539 (1971), found that the Hoko River was the boundary between the two tribes' territories, with Klallam territory extending to the east, and Makah to the west.

The ruling of the lower court on these factual questions was not clearly erroneous and no important federal question is presented. The determinations made below are consistent with previous rulings and not in conflict with any previous decision of this court or any other court.

B. The Extent Of Reserved Treaty Rights To Take Fish At Usual And Accustomed Fishing Grounds Must Be Determined As Of The Time Of The Treaty.

The Makah Tribe attempts to use post-

treaty evidence to determine the relative rights of the tribes in the disputed rivers. To do so would deprive the Lower Elwha Tribe of the vested rights it reserved in the Treaty of Point No Point, 12 Stat. 1933. It would also work a change in the long-standing rules governing this case and the determination of usual and accustomed areas, and in the law of reserved treaty rights generally.

There is no disagreement that the right to take fish at all usual and accustomed fishing grounds was not granted to the tribes, but rather reserved by them. United States v. Winans, 198 U.S. 371, 381 (1905); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979). The question to be answered is, what were the rights that were reserved?

Treaties with Indian tribes must be construed "in the sense in which they

would naturally be understood by the Indians." Passenger Fishing Vessel, 443 U.S. at 676, quoting Jones v. Meehan, 175 U.S. 1, 11 (1899). At the time of the treaties, Makah fishing east of the Hoko was by permission or due to intermarriage with Klallams. On the Hoko, the Elwhas fished freely with the Makahs. As the Ninth Circuit said:

> We may infer that the tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty.

642 F.2d at 1144 (footnote omitted).

The Lower Elwha Tribe never contemplated that by signing the treaty it was opening up rivers it had controlled to unlimited fishing by the Makahs, or that it could be excluded from a river it had always fished freely in common with the Makahs. As the district court recognized in its original decision, 384 F.Supp. at

357, FF 26, the tribes did not expect to give up control over fisheries by signing the treaties:

> 26. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty.

The Makah Tribe has never challenged this finding.

The entire litigation of United States v. Washington has explicitly recognized that, as to matters involving usual and accustomed fishing grounds, the rights of the tribes were fixed as of the time of the treaty. Conclusion of Law Number 20, 384 F.Supp. at 401, states:

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times,....

Also:

> ...the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

384 F.Supp. at 402, CL 26.

The establishment of usual and accustomed fishing grounds depends upon a showing of the areas customarily fished at treaty times. No party has ever disputed that ruling. After approximately 20 different determinations of tribal usual and accustomed fishing areas, including the original determination of the Makah areas on this basis, it is now rather late for the Makah Tribe to claim that the reservation of such rights can be changed by post-treaty tribal activities.

The district court has also, in other situations, upheld the concept of tribal control over fishing by members

of another tribe, where those members' fished due to kinship with the controlling tribe. In 1974, the district court held that Indians' rights in their natal territory, or in territories where they had consanguineal kin, were permissive use rights. 384 F.Supp. at 353, FF 12. The Lummi Tribe later established its right to control fishing by the Swinomish Tribe in one area, based upon that relationship at treaty times. 459 F.Supp. at 1049, para. 7.

The Makah Tribe does not point to any inconsistent decisions from other federal courts to support its Petition in this regard. In at least one case, United States v. Top Sky, 547 F.2d 486 (9th Cir. 1976), the extent of rights reserved by an Indian treaty was explicitly decided upon the basis of treaty time practices and customs. In that case the court limited a treaty reserved right to hunt

eagles because of historical evidence showing that sales of eagle parts was deplored by the Indians. The court held that no right to sell eagles had been reserved.

To now abandon treaty times as the standard for measuring rights to fish in usual and accustomed areas invites chaos. Without a fixed point of reference, there could never be a final determination of any tribe's areas or rights in those areas. They would always be open to the claim that circumatances had changed, and that a previous decision must be adjusted. The Makah Tribe suggests no reason why 1981 is a more appropriate date to determine these rights than 1854, or, for that matter, 2001, 1974 or any other date.

The Makah Tribe argues that after the treaty the Lower Elwha Tribe "drifted away from fishing towards agriculture, industrial and other pursuits associated

with non-Indian economy." Petition, p.17. The Makah Tribe apparently seeks to profit from the misfortune of the Lower Elwha people who were viciously excluded from their traditional fishing grounds. Unlike the Makah, the Lower Elwha Tribe was unfortunate in being located near an area non-Indians soon coveted for themselves. The effects of non-Indian settlement had a greater impact on them than on the much more isolated Makah. But this court has recognized that such factors can not serve to deny fishing rights Indian people believed they were securing by the treaties:

> The impact of illegal regulation... and of illegal exclusionary tactics by non-Indians... in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century.

Passenger Fishing Vessel, 443 U.S. at 669, n. 14.

At the time of the original decision in United States v. Washington in 1974, the Tribes were collectively taking approximately 2% of the fish in the case area. 459 F.Supp. 1032; 443 U.S. at 676-677, n.22. A great number of tribes were obviously forced to rely upon any work they could find during the time they were illegally excluded from their traditional fisheries. The Makah Tribe should no more profit from that circumstance than non-Indians.

Finally, the Makah Tribe argues that to permit the Lower Elwha Tribe to control Makah fishing on any river is inconsistent with the finding that the river is a usual and accustomed fishing ground of the Tribe. Petition, p.47. That argument misses the point. The question is under what circumstances was fishing

conducted on rivers within both tribes' usual and accustomed areas. The argument rings somewhat hollow, as well, because the Makah Tribe excludes the Lower Elwha Tribe from the Sekiu River, which is an Elwha usual and accustomed area subject to Makah control, and Makah seeks the same status for the Hoko River.

IV. CONCLUSION

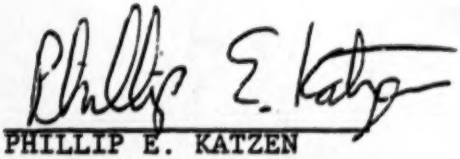
The district court and the Court of Appeals followed well-established rules of law to interpret Indian treaty rights and to determine the extent of those rights. The Petitioner has shown no inconsistency with the decisions of this court, any other court or prior decisions of the district court in this lengthy litigation. The Petitioner seeks to change these well-settled rules.

The real dispute is over the district court's findings of fact regarding Lower

Elwha control of Makah fishing at treaty times. Those findings are supported by substantial evidence and not clearly erroneous.

The Petition for a Writ of Ceriorari should be denied.

Respectfully submitted, August 12, 1981.



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